(3) (2)

Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

APPELLEES' MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether the district court correctly held that Section 702 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1, as amended, is unconstitutional under the Establishment Clause of the First Amendment, as applied to exempt from Title VII liability the private appellants' firing of appellee Arthur Frank Mayson for solely religious reasons, when Mayson's job as a building maintenance engineer at a public gymnasium owned by appellants required him to perform only secular, nonreligious tasks, when the gymnasium is engaged in only secular, nonreligious activities, when no sincerely held religious belief of appellants is implicated by the gymnasium's activities or the employment practices challenged here, and when the effect of §702's unbounded immunity is solely to give religious employers the ability to coerce religious adherence from their employees thus abridging the employees' freedom of religious conscience?

2. Whether the district court correctly held that the private appellants are liable to appellee Mayson for the Title VII remedy of backpay as a result of their firing Mayson for religious reasons when they purported to rely on the permissive exemption contained in §702 to justify Mayson's termination?

PARTIES

The private parties are identified in the Jurisdictional Statement filed by the private defendants in this case, *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, No. 86-179, at page ii (hereinafter "CPB J.S."). Having intervened in this action in the district court, the United States has also filed a Jurisdictional Statement, *United States v. Amos*, No. 86-401 (hereinafter "U.S. J.S.").

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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Pursuant to Rule 16.1(c) and (d) of the Rules of this Court,[1] appellees move to affirm the judgment of the United States District Court for the District of Utah.

[1] By Letter of the Clerk of this Court dated August 11, 1986, appellees' time to move under Rule 16 in No. 86-179 was extended to October 14, 1986, to coincide with the time for such a motion in No. 86-401.

STATEMENT OF THE CASE

The district court's Final Judgment and Order of May 16, 1986, (App. 83a-87a)[2] adjudicated the claims only of appellee Arthur Frank Mayson. A review of the facts underlying Mayson's claim demonstrates both the narrowness and correctness of the decision of the district court.[3]

The Deseret Gymnasium (the Gym) is a public gymnasium in Salt Lake City, Utah, owned and operated by appellants, the Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints and the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints (collectively "the Corporations"). In December 1964, Mayson was hired to work at the Gym as the assistant building engineer. In 1972, he was promoted to building engineer, a position he held until he was fired on April 10, 1981. When hired in 1964, Mayson was not asked if he was eligible for a Mormon "temple recommend",[4] nor was he told that eligibility was a condition for his employment. Although Mayson is nominally a member of the Mormon Church, he has never qualified for a temple recommend. During his 16 years of employment at the Gym, he received a promotion and frequent merit pay increases.

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[2] "App." refers to the appendix to the Jurisdictional Statement filed by appellants in No. 86-179.

[3] The facts are taken from the Affidavit of Arthur Frank Mayson, dated August 16, 1983, submitted to the district court in opposition to the Corporations' motion to dismiss or, alternatively, for summary judgment.

[4] *See* CPB J.S. at 4 n.2.

In the fall of 1980, Mayson was informed that the Corporations were now requiring that employees qualify for a Mormon temple recommend as a condition of employment. His employer had determined that Mayson was not eligible because he was not regularly attending Mormon Church services and he was not complying with the Mormon Church's requirement that its members pay a tithe of 10% of their pretax income. Mayson was told that if he did not become eligible for a temple recommend within six months, he would be fired. Believing that his job at the Gym had nothing to do with religious matters, Mayson refused to comply. He was fired on April 10, 1981, solely because he had not qualified for a Mormon temple recommend. At that time, Mayson was 56 years old and had been employed at the Gym for over 16 years.

During Mayson's employment, non-Mormons were employed in various positions at the Gym, including those of lifeguard, janitor, athletic instructor and squash pro. At least two non-Mormons were employed at the Gym after Mayson's termination.

Mayson, together with six employees of another Mormon Church-owned operation, Beehive Clothing Mills, who also had been fired from positions they had held for several years solely because of their failure to satisfy the newly imposed temple recommend requirement, filed this action contending that their terminations violated Section 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) which, *inter alia*, prohibits religious discrimination in employment. Appellees

alleged that, to the extent that the Corporations attempted to rely on the exemption for religious corporations, associations, educational institutions or societies contained in §702, to shield their admittedly religiously based firings of appellees from Title VII liability, that reliance was misplaced because §702, as applied to employees performing secular, non-religious activities, violates the Establishment Clause of the First Amendment.

The Corporations moved to dismiss or for summary judgment. The district court denied the Corporations' motion. 594 F.Supp. 791 (App. 1a-82a). It held that, as applied to Mayson's employment at the Gym, §702 violates the Establishment Clause. Acknowledging that the religious activities of religious organizations properly could be exempt from Title VII liability for religious discrimination, the court considered whether the Gym was, in fact, a religious activity. The court found:

> . . . [T]here is nothing in the running or purpose of Deseret [Gymnasium] that suggests that it was intended to spread or teach the religious beliefs and doctrine and practices of sacred ritual of the Mormon Church or that it was intended to be an integral part of church administration. Rather, its primary function is to provide facilities for physical exercise and athletic games. Deseret is open to the public for annual membership fees or for daily or series admission fees. It offers the same facilities and services that are available at other gymnasiums, and the employees perform the same jobs that are performed at any public gymnasium or athletic club. . . . More importantly, there is no evidence or a contention that the re-

> ligious tenets of the Mormon Church involve or require religious discrimination is employment. . . . Furthermore, the [defendants] do not contend and there is no evidence that it is a fundamental tenet of the Mormon Church that its members must engage in physical exercise and activity and must do so in a gymnasium owned and operated by the Mormon Church and in which all employees are practicing members of the Mormon Church. In addition, defendants do not contend and there is no evidence that engaging in physical exercise is a religious ritual of the Mormon Church, or that Deseret is used as a means of teaching or spreading the Mormon Church's religious beliefs or practices. . . .
>
> As the building engineer, plaintiff Mayson was responsible for maintaining the physical facility at Deseret, the equipment in the facility and the grounds outside the facility. . . .
>
> None of [Mayson's] duties is even tangentially related to any conceivable religious belief or ritual of the Mormon Church or church administration. Furthermore, none of those duties can potentially further any alleged religious activity in which Deseret may engage. Thus, there is no basis on which the court can find that this case, as it relates to Deseret, involves religious activities.

594 F.Supp. at 800-02 (App. 13a-18a) (footnotes and citations omitted).

The district court's findings were reached prior to any discovery and on the basis of the Corporations' motion for summary judgment. Appellants do not challenge them.

While two lower federal courts and a legal commentator have suggested that the §702 exemption is un-

constitutional as applied to secular activities of religious employers,[5] the court below is the first squarely to decide the question. In concluding that, as applied to Mayson's employment at the Gym, §702 violates the Establishment Clause, the district court first correctly rejected the Corporations' contention that applying Title VII's proscription against religious discrimination to religious employers with respect to their secular activities would unconstitutionally entangle Church and State. That conclusion was firmly supported by the facts that Congress has not chosen to exempt religious employers totally from Title VII liability, that this case does not involve internal church conflicts over doctrine, practice or discipline, and that the federal courts can and do analyze the religious content of activities and jobs performed by employees of religious employers to determine whether the National Labor Relations Act and Title VII's proscription against discrimination on the basis of race, color, sex and national origin apply to religious employers. *See* 594 F.Supp. at 814-17 (App. 43a-52a); *see also* note 9, *infra*.

Next, the court rejected the Corporations' claim that the Free Exercise Clause requires immunity from Title VII liability. Noting that, as applied to Mayson, enforcement of Title VII's prohibition against religious discrimination does not conflict with Mormon doctrine or prohibit an activity rooted in religious belief, the court found

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[5] *See King's Garden, Inc. v. F.C.C.*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974); *Feldstein v. Christian Science Monitor*, 555 F.Supp. 974 (D. Mass. 1983); Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations*, 79 COLUM.L.REV. 1514, 1547-48(1979).

that the Mormon Church's free exercise rights are not burdened. The court observed, however, that even if this case did impact on the exercise of a sincerely held belief, the Free Exercise Clause would not be violated because Title VII's purpose to eliminate all forms of employment discrimination "is equally if not more compelling than other interests which have been held to justify legislation that burdens the exercise of religious convictions." 594 F.Supp. at 817-20 (App. 52a-58a), *quoting E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1280 (9th Cir. 1982).

Since the unbounded §702 exemption is not constitutionally required, the court analyzed its constitutionality under the Establishment Clause, guided principally by the three-prong test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). It concluded that, although Congress had a permissible secular purpose in enacting §702, the direct and immediate effect of the exemption was impermissibly to advance religion. 594 F.Supp. at 820-26 (App. 58a-70a). Accordingly, the court refused to dismiss appellees' Title VII claims, and held that §702, as applied to Mayson, is unconstitutional.

The parties then conducted some discovery. As to Mayson, discovery focused on the facts needed to determine the backpay to which Mayson was entitled. The Corporations claimed that even if Mayson's firing violated Title VII, they should not be liable for backpay because they had relied on the permissive exemption in §702. On appellees' motion for summary judgment, the district court rejected that argument, noting that there is

a strong presumption in favor of backpay awards in Title VII cases and that a denial of backpay would frustrate Title VII's purpose of making Mayson whole for his injuries from the Gym's discrimination. 618 F.Supp. at 1027-29 (App. 116a-120a).

After the issue of the Corporations' backpay liability had been resolved, the parties stipulated to the amount of backpay to which Mayson was entitled. Appellees then promptly moved for entry of final judgment for Mayson pursuant to FED.R.CIV.P. 54(b). That judgment, first entered in January 1986, was vacated to permit certification to the Attorney General under 28 U.S.C. §2403. The United States intervened and filed a memorandum urging the district court to reconsider its conclusion that §702 is unconstitutional, as applied. After reviewing memoranda from the United States and appellees and hearing argument, the district court reaffirmed its earlier decisions and re-entered final judgment for Mayson.[6]

THE MOTION TO AFFIRM SHOULD BE GRANTED

The district court has decided only that §702 is unconstitutional as applied to Mayson's employment at the Gym; thus, that his firing for admittedly religious reasons violated Title VII and that he is entitled to Title VII's backpay remedy. Summary affirmance is appropriate be-

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[6] The district court has granted summary judgment in favor of the Corporations dismissing the claims of one of the plaintiffs below, Ralph Whitaker. 618 F.Supp. at 1022-27 (App. 105a-116a). The district court has not resolved the claims of the appellees who were former employees at Beehive Clothing Mills. *See id.*, at 1016-1022 (App. 93a-105a).

cause (1) this is the first case to hold that §702 is unconstitutional as applied, and the facts which support that holding are narrow and compelling; (2) the decision in light of those facts is clearly correct; (3) there is no conflict among the lower courts on the constitutional issue; and (4) the district court's backpay award is wholly consistent with Title VII's purpose.

1. The facts supporting the judgment for Mayson are narrow and compelling. The activities of the Gym are undisputedly secular. There is no contention that those activities or Mayson's firing are mandated by any sincerely held Mormon religious belief. This is a clear case of a religious employer simply using the §702 exemption to coerce religious loyalty through the economic power that an employer enjoys over its employees. This is a clear case of an advantage being granted to religious employers over non-religious employers without any First Amendment justification therefor. The inquiry as to whether the activity in question is religious or secular was not unduly intrusive: the matter was resolved on a motion for summary judgment prior to any discovery. And it is a case where prohibiting religious discrimination by a religious employer against a secular employee strengthens First Amendment values by protecting the employee from economically coerced religious loyalty.

2. The district court's decision was clearly correct.

a. Congress' decision to grant an exemption from the scope of Title VII liability drawn strictly on religious grounds plainly implicates Establishment Clause concerns. *King's Garden, Inc., supra; Feldstein, supra; see*

Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972). In analyzing the constitutionality of §702, the district court was correctly guided by the three independent tests set forth in *Lemon, supra. See Witters v. Washington Dep't of Services for the Blind*, 106 S.Ct. 748 (1986); *Grand Rapids School District v. Ball*, 105 S.Ct. 3216 (1985); *Aguilar v. Felton*, 105 S.Ct. 3232 (1985); *Estate of Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

b. Appellees below argued that §702 lacks a valid secular purpose because its purpose is simply to invite religious employers to discriminate where all other employers may not discriminate. *See King's Garden, Inc., supra*, 498 F.2d at 55. The district court disagreed, finding a valid purpose of "assuring that the government remains neutral and does not meddle in religious affairs by interfering with the decision-making process in religions . . ." 594 F.Supp. at 812 (App. 40a).

If that was really Congress' purpose, it would have exempted religious employers altogether from the scope of Title VII, something that it has refused to do. Religious employers are subject to Title VII's prohibition against discrimination on the basis of race, color, sex and national origin. By refusing to exempt religious employers totally from Title VII, Congress demonstrated that it was not its purpose to avoid "meddling" in their affairs. But by permitting religious employers to discriminate on the basis of religion in all of their activities, Congress invited religious employers to coerce religious loyalty through the economic power that employment gives an employer over an

employee. Such a purpose to advance religion is improper.

Even if supported by a permissible purpose, §702 is far broader than necessary to protect the legitimate First Amendment interests of religious employers. Appellants suggest that because Congress arguably had a permissible purpose to accommodate religion, the effect of the broad §702 exemption is necessarily permissible. There is no support for that position:

> . . . the propriety of a legislature's purpose may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State.

Committee for Public Education v. Nyquist, 413 U.S. 756, 774 (1973); *see id.*, at 788-89. Where the two religion clauses seem to pull in conflicting directions, statutes must be narrowly and carefully drawn. *Widmar v. Vincent*, 454 U.S. 263, 269-270 (1981); *see Larson v. Valente*, 456 U.S. 228, 246-47 (1982).[7]

Two recent decisions illustrate this point. In *Estate of Thornton, supra*, a state statute which attempted to accommodate religion by giving each employee an absolute right to designate a particular day as his Sabbath and prohibiting his employer from dismissing the

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[7] None of the cases cited by the Corporations for the proposition that Congress has broad discretion in exercising its commerce clause powers — *Davis v. Passman*, 442 U.S. 228 (1979); *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946); *Currin v. Wallace*, 306 U.S. 1 (1939); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) — involve legislation in areas where the religion clauses conflict.

employee for refusing to work on that day was held to violate the Establishment Clause. This Court affirmed the state court's determination that the statute was unconstitutional since it had an impermissible primary effect of advancing religion. This was so, the Court concluded, because of the statute's "unyielding weighting in favor of Sabbath observers over all other interests" including the interests of "[o]ther employees who have strong and legitimate, but nonreligious reasons for wanting a weekend day off . . ." 105 S.Ct. at 2918 & n.9. Thus, a statute intended to accommodate religion may have an unconstitutional effect when it is overly broad or unyielding to legitimate countervailing interests.

Similarly, in *Grendel's Den, Inc., supra,* this Court invalidated a state statute giving schools and churches the power to veto the issuance of liquor licenses to establishments in their vicinity. Accepting the state's contention that the statute had a valid secular purpose, 459 U.S. at 123, the Court still struck down the law under the effect and entanglement prongs of the *Lemon* test. In so doing, the Court observed:

> There can be little doubt that [the statute] embraces valid secular legislative purposes. However, these valid secular objectives can be readily accomplished by other means . . .

Id., at 124.[8]

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[8] The state in *Grendel's Den* sought to justify the statute under the broad powers enjoyed by the states under the Twenty-First Amendment. This Court noted that "the State may not exercise its power under the 21st Amendment in a way which impinges upon the Establishment Clause of the First Amendment." 459 U.S. at 122, n.5.

The court in *King's Garden, Inc., supra,* accurately defined the scope of congressional discretion in this sensitive area:

> "The Court must not ignore the danger that an exemption from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exemption no matter how vital it may be to the protection of values promoted by the rights of free exercise." . . . *Wisconsin v. Yoder,* 406 U.S. 205, 220-21 (1972).
>
> . . . In this matter of exemptions the First Amendment strings a "tight rope" between the two religion guarantees, *Walz v. Tax Commission,* . . . 397 U.S. [664] 672 [(1970)], . . .
>
> From 1964 to 1972 Congress had, in our view, a firm purchase on the tightrope. The exemption then granted by the Civil Rights Act to the *religious* activities of religious organizations was itself required by the First Amendment.
>
> * * *
>
> But the 1972 exemption [contained in §702] now shelters myriad "activities" which have not the slightest claim to protection under the Free Exercise, Free Speech, or Free Press guarantees. It is arguable that Congress may, without violating the Establishment Clause, expand a religious exemption *somewhat* beyond the minimal boundaries created by the several First Amendment liberties. *See, Walz v. Tax Commission, supra*[;] . . . *Zorach v. Clauson,* 343 U.S. 306 (1952). . . . But these isolated decisions create no precedent for the unlimited 1972 exemption.

498 F.2d at 55-57 (emphasis in original); *see Feldstein, supra,* 555 F.Supp. at 978-79.

In most contexts, Congress and the courts have determined that labor laws should apply to religious employers[9] except in cases, unlike this one, where compelling First Amendment concerns require an exemption.[10]

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[9] *See, e.g., Tony & Susan Alamo Foundation v. Sec'y of Labor*, 105 S.Ct. 1953 (1985) (Fair Labor Standards Act applies to religious employers); *United States v. Lee*, 455 U.S. 252 (1982) (religious employer must pay social security taxes for employees notwithstanding religious objection); *Volunteers of America-Minnesota v. N.L.R.B.*, 752 F.2d 345 (8th Cir.), *cert denied*, 105 S.Ct. 3502 (1985) (NLRB has jurisdiction over employees of church owned residential treatment center); *Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B.*, 732 F.2d 769 (10th Cir. 1984) (NLRB has jurisdiction over employees of religious organization's social programs); *St. Elizabeth's Community Hospital v. N.L.R.B.*, 708 F.2d 1436 (9th Cir. 1983) (NLRB has jurisdiction over employees of religious hospital); *Tressler Lutheran Home for Children v. N.L.R.B.*, 677 F.2d 302 (3d Cir. 1982) (NLRB has jurisdiction over employees of religious nursing home); *N.L.R.B. v. St. Louis Christian Home*, 663 F.2d 60 (8th Cir. 1981) (NLRB has jurisdiction over church-operated home for neglected children); *Catholic High School Ass'n v. Culvert*, 753 F.2d 1161 (2d Cir. 1985) (state labor relations board has jurisdiction over parochial school's lay teachers); *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986) (EEOC has jurisdiction over sex discrimination claims against religious school); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272 (9th Cir. 1982) (Title VII prohibits sex discrimination by religious publishing house); *King's Garden, Inc. v. F.C.C., supra* (FCC may proscribe religious discrimination by religious licensees); *cf. Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 106 S.Ct. 2718 (1986).

[10] *See N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972); *Rayburn v. General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985), *cert. denied*, 106 S.Ct. 3333 (1986). The constitutional exemption from Title VII recognized in *McClure* and *Rayburn* is limited to employees performing ministrial functions. Appellants' reliance on this Court's decision in *Catholic Bishop* is wholly misplaced. The federal courts have limited the scope of the *Catholic Bishop* exemption from NLRB jurisdiction to religious schools and have held that the Labor

There is a strong national policy to apply important federal labor laws, such as Title VII, to religious organizations absent a compelling First Amendment reason not to do so. *See, e.g., E.E.O.C. v. Fremont Christian School, supra,* 781 F.2d at 1368-69; *E.E.O.C. v. Pacific Press Pub. Ass'n, supra,* 676 F.2d at 1280. No such reason exists for exempting an employee such as Mayson from the protections of Title VII.

Far from being routinely upheld,[11] religious exemptions are constitutionally suspect. *See Wisconsin v. Yoder, supra,* 406 U.S. at 220-21. For example, *Estate of Thornton, supra,* involved an exemption from the general rule of employment-at-will by providing employees the absolute right to a day off for their designated Sabbath without fear of termination. The Connecticut court struck down the statute on the ground that its primary effect was to advance religion because the statute "confers its benefit on an explicitly religious basis." *Caldor, Inc. v. Thorn-*

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[10] *Continued*

Board may assert jurisdiction over a broad variety of activities of religious organizations similar to those involved in this case. *See, e.g., Volunteers of America-Minnesota, supra; Denver Post of the Nat'l Soc'y of the Volunteers of America, supra; Tressler Lutheran Home for Children, supra.*

[11] Appellants claim that this Court has frequently upheld exemptions from generally applicable statutes or rules for religious institutions and individuals. U.S. J.S. at 10. That is plainly not true. *See, e.g., Bowen v. Roy,* 106 S.Ct. 2147 (1986); *Goldman v. Weinberger,* 106 S.Ct. 1310 (1986); *Tony & Susan Alamo Foundation, supra; United States v. Lee, supra.* In these cases, this Court denied the claim for an exemption, even though the party seeking the exemption on religious grounds contended that the generally applicable statute or rule conflicted with a sincerely held religious belief. Here, there is no such conflict.

ton, 464 A.2d 785, 794 (Conn. 1983). This Court affirmed, observing that the statute gives "sabbath observers the valuable right to designate a particular weekly day off. . . . Othr employees who have a strong and legitimate, but non-religious reason for wanting a weekend day off have no rights under the statute." 105 S.Ct. at 2918 & n.9. *See Welsh v. United States*, 398 U.S. 333 (1970); *id.*, at 356-57 (Harlan, J., concurring).[12]

As the cases above amply demonstrate Congress may not have been constitutionally obliged to prohibit religious discrimination in private employment; but having decided to do so, it created serious Establishment Clause concerns by exempting religious employers from liability for religious discrimination against employees

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[12] Any suggestion that §702's explicit religious distinction is permissible because religious organizations have a greater interest in practicing religious discrimination in employment than do "non-religious" employers is factually doubtful and constitutionally irrelevant. Many private employers who would not qualify as a "religious corporation, association . . . or society" within the meaning of §702, may, nonetheless, have strong and sincerely held religious beliefs which conflict with the edicts of federal and state labor law. *See, e.g., United Sates v. Lee, supra* (sincerely held religious belief prohibiting participation in social security system); *State by McClure v. Sports & Health Club, Inc.*, 370 N.W.2d 844 (Minn. 1985), *app. dismissed sub nom., Sports & Health Club, Inc. v. Minnesota*, 106 S.Ct. 3315 (1986) (born-again Christian owners of commercial health spas not entitled to discriminate in employment on basis of religion, notwithstanding sincerely held religious beliefs). The interests of the employers in *Lee* and *Sports & Health Club* in an exemption from the social security laws or the state antidiscrimination laws were much stronger than the interest of the Corporations here since those interests were based on sincerely held religious beliefs, whereas no such beliefs dictated the discrimination against Mayson.

engaged in secular non-religious activities.[13]

c. As the district court correctly concluded, §702 has the impermissible effect of advancing religion. The Corporations have used the power §702 gives them to extract from their secular employees religious obedience and substantial economic concessions. One of the religious requirements imposed on appellees and one of the reasons for the termination of several of them was noncompliance with the Mormon Church's tithing requirement. *See, e.g.*, Affidavit of Arthur Frank Mayson, dated August 16, 1983, ¶¶ 13, 19, 20, 22. That requirement demands payment of 10% of an individual's gross income to the Mormon Church. Appellees have never questioned the Mormon Church's right to impose a tithing requirement — or any other requirement — on its members. However, permitting the Corporations to impose such a requirement on all of their employees, as §702 does here, impermissibly advances religion. The ability to coerce the return of 10% of an employee's gross income gives church-owned businesses an impermissible competitive advantage over non-religiously-owned ones.[14]

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[13] If Congress had withdrawn the prohibition against all religious discrimination, *Crawford v. Board of Education*, 458 U.S. 527 (1982), might be germane. However, *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), a companion case to *Crawford*, is instructive. There, the Court struck down on equal protection grounds a state initiative because it used the racial nature of the busing issue to define governmental decision-making structures. Religious classifications, like racial classifications, are suspect under both the Equal Protection Clause and the Establishment Clause. *See Widmar v. Vincent, supra; Larson v. Valente, supra; King's Garden, Inc., supra.*

[14] *See Tony & Susan Alamo Foundation, supra*, 105 S.Ct. at 1961 (rejecting a religious organization's claim for exemption from minimum

Section 702 also gives religious employers a competitive advantage in maintaining the productivity and discipline of their employees. Non-religious employers must rely on secular benefits and punishments, together with the strength, quality and benevolence of management to insure productivity and discipline. Section 702, however, permits religiously affiliated employers to invoke spiritual concerns and otherworldly blessings and punishments in controlling their work forces. Where the activities and jobs are not of a religious nature, this impermissibly gives religiously affiliated employers a secular advantage over non-religious employers.

Section 702 impermissibly enables religions to advance their religious goals through secular job-related coercion. In this respect, appellants' reliance on *Zorach v. Clauson, supra,* is ironic. There, Justice Douglas stated:

> We sponsor an attitude on the part of Government that . . . lets each [religious group] flourish according to the zeal of its adherents and the appeal of its dogma.

343 U.S. at 313-314. That is precisely what §702 does not do. Rather than letting each religion flourish according to the zeal of its adherents and the appeal of its dogma, §702 invites religions to flourish through the economic coercion they can exercise over employees by virtue of the employment relationship.

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[14] *Continued*

wage laws because "the payment of substandard wages would undoubtedly give petitioners and similar organizations an advantage over their competitors. It is exactly this kind of 'unfair method of competition' that [the Fair Labor Standards Act] was intended to prevent, . . . and the admixture of religious motivations does not alter a business's effect on commerce.")

This Government grant of coercive assistance impermissibly confers on religious employers symbolic benefits as well. *See Grand Rapids School District v. Ball, supra*, 105 S.Ct. at 3226. In an area as heavily regulated as the employment relationship in modern American society, Government sanctioned religious discrimination by religious employers, where there is no religious justification for such discrimination, conveys a message of Government endorsement of practices which coerce religious loyalty and encourage religious intolerance.

In addition to economic efficiency, Title VII's proscription against employment discrimination vindicates concerns for fairness, equality and the dignity of all persons. Discrimination violates deeply and widely held views of elementary justice. *See Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 592 (1983); *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 763 (1976). The broad exemption in §702 seriously undercuts those values. Concerns for equal employment opportunity, personal autonomy and religious liberty fully support limiting the breadth of the §702 exemption as the district court has done.

d. The district court correctly concluded that §702 lacks the characteristics which have served to sustain statutes under the Establishment Clause. Appellants are flatly wrong when they contend that this Court has frequently approved exemptions drawn on religious lines. More frequently, it has invalidated or denied them. *See, e.g., Bowen v. Roy, supra; Goldman v. Weinberger, supra;*

Estate of Thornton, supra; Tony & Susan Alamo Foundation, supra; United States v. Lee, supra; Welsh v. United States, supra. This Court has warned of the "danger that an exemption from the general obligations of citizenship on religious grounds may run afoul of the Establishment Clause . . ." *Wisconsin v. Yoder, supra,* 406 U.S. at 220-21, and has emphasized that the facial neutrality of a statute is important. *See Witters, supra,* 106 S.Ct. at 752; 594 F.Supp at 822-24 (App. 61a-66a)[18]

The district court was similarly correct that the §702

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[18] The cases cited by the United States do not support its argument. *United States v. Lee, supra,* denied an exemption from the employer's duty to pay social security taxes for his employees. *St. Martin's Lutheran Church v. South Dakota,* 451 U.S. 772 (1981), was decided purely as a matter of statutory construction and did not involve any claim that the exemption violated the Establishment Clause. *Catholic Bishop, supra,* held, as a matter of statutory construction, that the NLRB lacks jurisdiction over parochial schools. However, *Catholic Bishop* has been narrowly construed by the federal courts and has been deemed not to bar Labor Board jurisdiction over a wide variety of other religiously affiliated activities. *See* note 9, *supra. Braunfeld v. Brown,* 366 U.S. 599 608-09 (1961)' does not endorse religious exemptions and does not address the Establishment Clause issue. *Gillette v. United States,* 401 U.S. 437 (1971), only involved the question of whether conscientious objector status was available to persons objecting to a particular war rather than all wars, as the statute required. Significantly, *Gillette* followed the Court's decision in *Welsh* which read out of the statute the requirement that the conscientious objector's objection to war be religiously based. The crypic discussion of religious exemptions in *Selective Draft Law Cases,* 245 U.S. 366, 389-90 (1918), also must be read in light of *Welsh. Walz v. Tax Commission, supra,* sustained a tax exemption principally on the grounds that it was available to a wide variety of nonprofit organizations. Finally, *Zorach v. Clauson, supra,* which sustained release of public school students for religious instruction, has been essentially limited to its facts. *See King's Garden, Inc., supra.*

exemption lacks the historical tradition which served to support the property tax exemption in *Walz* or the legislature's chaplain in *Marsh v. Chambers*, 463 U.S. 783 (1983). Prior to enactment of the Civil Rights Act of 1964, all private employers were free, as a matter of federal law, to discriminate on all of the bases now prohibited by Title VII. However, since the passage of Title VII and other federal laws governing the employment relationship during the twentieth century, this Nation's historical tradition has been to apply labor laws to religious employers except where the First Amendment clearly requires an exemption. *See* notes 9 & 10, *supra*.

Finally, the district court correctly found that notions of religious accommodation have little relevance here. 594 F.Supp at 824-825 (App. 66a-68a). In the cases in which this Court has endorsed exemptions from generally applicable laws to accommodate religion, accommodation could be accomplished without infringing on the rights of third parties. *See, e.g., Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Walz v. Tax Commission*, *supra*. Where, as here, accommodation seriously trenches on the rights of others, accommodation has been rejected. *See, e.g., Estate of Thornton*, *supra*; *United States v. Lee*, *supra*.[18]

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[18] Title VII already contains ample protection for the legitimate First Amendment rights of religious employers. First, religious schools are exempt under a different exemption, 42 U.S.C. §2000e-2(e)(2). Second, the courts have recognized a constitutionally based exemption for employees performing minister-like functions. *See Rayburn*, *supra*; *McClure*, *supra*. Third, §703(e)(1) of Title VII provides that religious qualifications may be imposed where they

In sum, the district court clearly did not err when it held that §702, as applied to the secular, non-religious activities at issue in Mayson's case, violates the Establishment Clause.

e. The district court correctly concluded that:

> . . . the application of Title VII to religious organizations engaging in religious discrimination in secular, non-religious activities, does not excessively entangle the Government with the religious organizations.

594 F.Supp at 817 (App. 52a). The United States does not and cannot seriously challenge that conclusion since it has been a party in most of the cases relied on by the district court which have held that the National Labor Relations Act, Title VII, the Social Security Act, and the Fair Labor Standards Act can and should be applied to religious employers without giving rise to excessive entanglement.[17]

In many of these cases the courts have analyzed, in a manner very similar to the district court's analysis here, the religious content of activities in which religious organizations engage and of jobs performed by their employees to determine whether or not the employer should be exempt from federal labor laws. And these courts have consistently rejected the claim that such an analysis

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[16] *Continued*
constitute a bona fide occupational qualification. *See* 42 U.S.C. §2000e-2(e)(1). These protections, together with §702 as limited by the district court, adequately safeguard legitimate First Amendment concerns.

[17] *See* cases cited in note 9, *supra*.

involves excessive entanglement. *See, e.g., Tony & Susan Alamo Foundation, supra; E.E.O.C. v. Fremont Christian School, supra; E.E.O.C. v. Pacific Press Pub. Co., supra; Volunteers of America-Minnesota v. N.L.R.B., supra; Denver Post of the Nat'l Soc'y of the Volunteers of America v. N.L.R.B., supra.*[18]

Appellants, however, attempt to raise entanglement concerns through a "slippery slope" argument. Before the district court, the United States conceded that "Mr. Mayson's case may have seemed relatively easy to resolve" (Memorandum of Intervenor United States in Support of the Constitutionality of 42 U.S.C. §2000e-1, at 32), and that "this [c]ourt's holding as applied to Mr. Mayson may appear to be correct . . ." (*Id.*, at 31, n.12). But appellants suggest that harder cases may come along. That may very well be true. The risk that more difficult cases may arise in the future, however, does not justify an unconstitutional application of §702 here.[19]

Indeed, slippery slope arguments cut the other way.

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[18] Contrary to the suggestion of appellants, the district court did not decide any matter concerning the validity, truthfulness or propriety of the Mormon Church's practices or beliefs. Nor did the district court become involved in internal church conflicts over religious doctrine, practice or discipline. *See* 594 F.Supp. at 817-18, n.49 (App. 52a-53a, n.49).

[19] The district court's decision with respect to the claims of plaintiff Ralph Whitaker, a truck driver at Deseret Industries, demonstrates that the district court's analysis provides more than ample solicitude for the First Amendment rights of religious employers. *See* 618 F.Supp. at 1022-1027 (App. 105a-116a). Appellees have not cross-appealed from the district court's holding with respect to Whitaker. We point out only that exempting Whitaker from the protections of Title VII was not constitutionally required.

While harder cases may arise, cases even easier than Mayson's also will arise. But if appellants' position prevails, thousands of employees performing clearly secular tasks in secular enterprises will be subject to religious employment discrimination without the slightest First Amendment justification.

> To permit religious organizations to engage in religious discrimination in all of their secular, non-religious activities would "withdraw Title VII's protection from employees at the hundreds of diverse organizations affiliated with [religious entities], including businesses which process food, sell insurance, invest in stocks and bonds, and run schools, hospitals, laboratories, rest homes and sanitariums."

594 F.Supp. at 820 (App. 57a-58a), *quoting Pacific Press Pub. Ass'n, supra,* 676 F.2d at 1280.

In *United States v. Lee,* this Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limit they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from the social security taxes to an employer operates to impose the employer's religious faith on the employees.

455 U.S. at 261. If the scope of the §702 exemption is unbounded, religious organizations will be encouraged to expand their "activities" further and further into the secular economy and impose their faith on thousands of

employees performing wholly secular tasks. Such consequences run afoul of the Establishment Clause.

f. The district court considered, without deciding, whether §702 violates the third prong of the *Lemon* test by excessively entangling the Government with religious organizations. *See* 594 F.Supp. at 826-28 (App. 70a-75a). It concluded that an analysis of the character and purpose of the institutions benefitted and the nature of the aid provided weighs in favor of the view that §702 excessively entangles the Government with religion. 594 F.Supp. at 827 (App. 72a-74a). Appellees believe that this analysis is correct and requires the conclusion that §702 is also unconstitutional under the entanglement prong of the *Lemon* test.

The §702 exemption is "a sure formula for concentrating and vastly extending the worldly influence of those religious sects having the wealth and inclination to buy up pieces of the secular economy." *King's Garden, Inc., supra,* 498 F.2d at 55. The Mormon Church is one such sect. As two observers of the Mormon Church recently have written:

> . . . [T]here is nothing "other worldly" about Mormonism in the ordinary sense of the term. As religion and as dynamic organization, it is dedicated to "this-worldly" change aimed at establishing a communally owned and operated business empire and a theocratically ruled, unified world society. For members of the Church of Jesus Christ of Latter-day Saints, the material aspects of human existence are raised to the same status as spiritual concerns, . . . Mormon historian Leonard J. Arrington has written:

> Among the Mormons, things temporal have always been important along with things eternal, for salvation in this world and the next is seen as one and the same continuing process of endless growth. Building Zion, a literal kingdom of God on earth, has therefore meant an identity of religious and economic values. . . .
>
> Thus, economic growth is an integral part of Mormon theology.

J. HEINERMAN & A. SHUPE, THE MORMON CORPORATE EMPIRE, 77 (1985).

This theology of economic growth has led the Mormon Church to acquire a "widely diversified and profitable conglomerate" in the communications field, including three television stations and twelve radio stations, extensive agribusiness and commercial real estate holdings, a group of insurance companies, and a large securities portfolio, *see. id.*, at 46-124, and to become one of the largest employers in Salt Lake City and the State of Utah. *Id.*, at 92.

The §702 exemption gives the institution at issue here, the Mormon Church, the power to extract economic contributions and require absolute religious loyalty and obedience from its large number of employees, even those engaged in the Church's extensive secular activities. The effect is plainly to encourage the further incursion by religions such as the Mormon Church into the secular economic realm. The nature of this aid to religious employers—the authority to coerce religious

loyalty through economic power in the secular realm —excessively entangles Church with State.[20]

3. The district court's conclusion that §702, as applied to Mayson, is unconstitutional, is consistent with the conclusion of the other lower courts which have considered the issue. *See King's Garden, Inc., supra; Feldstein, supra*. There is no conflict requiring resolution by this Court.

4. The district court properly weighed the equities in deciding that, notwithstanding the Corporations' reliance on the permissive exemption in §702, an award of backpay to Mayson was appropriate.[21] 618 F.Supp. at 1027-29 (App. 116a-119a). The court's award is fully consistent with Title VII's strong presumption in favor of backpay, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975, and its "make-whole" purpose. *Id*. Plenary review of the award by this Court is unwarranted.

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[20] Religious organizations today seek to play an increasingly active and vocal role in the economic and political life of the Nation. Appellees do not in any way challenge their right to do so. The question, however, is whether religious groups, when they choose to interject themselves into the secular economic or political arenas, should be able to do so without being subject to important rules regulating participation in these secular realms.

[21] The Corporations did not oppose Mayson's request for reinstatement. *See* 618 F.Supp. at 1029 (App. 120a).

CONCLUSION

The motion to affirm should be granted.

October 14, 1986.

Respectfully submitted,

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Nos. 86-179 and 86-401

In the Supreme Court of the United States

OCTOBER TERM, 1986

THE CORPORATION OF THE PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS and THE UNITED STATES OF AMERICA,

Appellants,

v.

CHRISTINE J. AMOS, *et al.*,

Appellees.

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

I, David B. Watkiss, being sworn, state that on this ..... day of October, 1986, three copies of Appellees' Motion to Affirm in the above captioned case were mailed, in envelopes properly addressed and first class postage prepaid, to counsel of record for appellants herein and to the Solicitor General, and one copy to all other counsel herein, as follows:

Honorable Charles Fried
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I further state that all parties required to be served have been served.

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SWORN TO before me this ..... day of October, 1986.
